



JPB-555

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Appellants: Lukenbach et al. Attorney Docket No. JPB-555  
Serial No.: 09/905,387 Art Unit: 1617  
Filed : July 13, 2001 Examiner: Gina C. Yu  
For : **SELF FOAMING CLEANSING GEL**

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October 25, 2004  
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APPEAL BRIEF

Dear Sir:

In accordance with the provisions of 37 CFR 1.191, Appellants filed a timely Notice of Appeal in the above application on August 23, 2004 from the rejections made by the Examiner in the Office Action dated March 10, 2004.

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**(1) Real Party in Interest**

The real party in interest in the application in this appeal is Applicant's assignee Johnson & Johnson Consumer Companies, Inc., a corporation of New Jersey, a wholly owned subsidiary of Johnson & Johnson, a New Jersey corporation.

**(2) Related Appeals and Interferences**

Appellants are not aware of any related appeals or interferences.

**(3) Status of the Claims**

Claims 1-33 are pending in this application. Claims 34-38 have been canceled via an Amendment under § 41.33(b) filed concurrently herewith. Accordingly claims 1-33 are the claims on appeal, a copy of which are attached hereto in the Appendix to this Brief. No claims stand allowed in this application.

**(4) Status of Amendments**

On August 10, 2004 an amendment was made after receiving the Final rejection dated June 4, 2003. The amendment was entered. An Amendment under § 41.33(b) canceling withdrawn claims 34-38 is filed concurrently herewith (copy enclosed).

**(5) Summary of the Invention**

The present invention relates to a self foaming composition comprising a surfactant mixture and at least one self foaming agent. The surfactant mixture comprises (a) at least one anionic surfactant; (b) at least one amphoteric surfactant; and (c) optionally at least one nonionic surfactant and the ratio of (a) to (b) to (c) is selected such that when the surfactant mixture is mixed with the at least one self foaming agent a gel consistency is obtained. The self foaming composition according to the invention is in the form of a liquid crystalline structure. As discussed in the Specification, Appellants have discovered that it is possible to produce a high-foaming gel cleansing composition that not only spreads more easily along the skin but also produces more foam more quickly than other foaming gels in the art. This is done by controlling the physical structure, i.e., liquid crystalline structure, and the viscosity, i.e., gel consistency, of the composition as well as by selecting specific surfactant combinations, i.e., anionic, amphoteric and optionally nonionic surfactant. Specification, page 2, lines 22-31.

**(6) Issues on Appeal**

- I) Whether Claims 1 - 14, 17, 18, 21 - 29, and 31 - 33 are unpatentable under 35 U.S.C. §103 in view of the combination of United States Patent No. 5,334,325 ("Chaussee") and United States Patent No. 5,599,549 ("Wivell").

II) Whether Claims 15, 16, and 30 are unpatentable under 35 U.S.C. 103(a) by Chaussee and Wivell further in view of U.S. Patent No. 6,666,362 ("Lorant").

III) Whether Claims 19 and 20 are unpatentable under 35 U.S.C. 103(a) in view of Chaussee, Wivell, Lorant further in view of United States Patent No. 5,858,343 ("Szymczak").

**(7) Grouping of Claims**

Appellants believe that all of their claims are patentable over the prior art. For purposes of this Appeal, claims 1-34 stand together.

**(8) Argument**

A. Claims 1 - 14, 17, 18, 21 - 29, and 31 - 33 are not unpatentable under 35 U.S.C. §103 by U.S. Patent No. 5,334,325 ("Chaussee") in view of U.S. Patent No. 5,599,549 ("Wivell").

Claims 1 - 14, 17, 18, 21 - 29, and 31 - 33 stand rejected under 35 U.S.C. 103(a) as being unpatentable over United States Patent No. 5,334,325 ("Chaussee") in view of United States Patent No. 5,599,549 ("Wivell"). Appellants respectfully disagree with this rejection.

The Examiner relies upon Chaussee as disclosing a delayed-gelling, post-foaming composition comprising an anionic phosphonate surfactant. The Examiner acknowledges that Chaussee does not teach or suggest a liquid crystal composition. The Examiner relies on Wivell for teaching a cleansing composition that

includes a dispersion of oil that may be in the form of a liquid crystal. The Examiner then concludes that the present invention is obvious over the combined references. Appellants respectfully disagree.

Wivell does not teach a self-foaming composition wherein the composition is in the form of a liquid crystal. In contrast, Wivell teaches a personal cleansing composition comprising surfactant, a suspending agent, a dispersed, insoluble, oil phase, and water. Wivell teaches that the dispersed, insoluble, oil phase exists as a separate and distinct phase of fine particles, aggregates or liquid crystals within the water phase. See col. 4, lines 40-43. Although the oil phase of the Wivell composition may be in the form of a liquid crystal, the Wivell composition, in its entirety, is not in the form of a liquid crystal. Clearly, there is no teaching or suggestion of a composition comprising a surfactant mixture and at least one self foaming agent, wherein the composition is in the form of a liquid crystalline structure.

The Examiner argues that "it would have been obvious to one having ordinary skill in the art at the time the invention was made to have modified the composition of Chaussee by adding the dispersing phase of the conditioning oil phase as motivated by Wivell because of an expectation of successfully producing a foaming cosmetic with liquid crystal structure."

As the Examiner is well aware, to establish a prima facie case of obviousness, three basic criteria must be met. First, there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or to combine reference teachings. Second, there must be a reasonable expectation of success. Finally, the prior art reference (or

references when combined) must teach or suggest all the claim limitations. See M.P.E.P. § 2143.

Here, there is nothing in the teachings of Wivell that would provide one of ordinary skill in the art with the motivation to modify the compositions of Chaussee as suggested by the Examiner. The Examiner's statement regarding motivation is simply "an expectation of successfully producing a foaming cosmetic with liquid crystal structure." Why would one of ordinary skill in the art want to produce a foaming cosmetic with liquid crystal structure? Wivell does not teach any benefits of such in the compositions of Chaussee. The mere fact that references can be combined or modified does not render the resultant combination obvious unless the prior art also suggests the desirability of the combination. See M.P.E.P. § 2143.01, p. 2100-131.

In response to Appellants' arguments regarding the lack of motivation, the Examiner asserts that "the rejection must be construed in view of the collective teachings of the two references." Appellants agree. However, the Examiner has failed to show how the collective teaches of the two references would motivate one of ordinary skill in the art to modify the compositions of Chaussee as suggested by the Examiner.

Further, even if one of ordinary skill in the art were somehow motivated to make the modification suggested by the Examiner, there is no teaching or suggestion in Wivell or Chaussee that the dispersed, insoluble, oil phase which exists as a separate and distinct phase of fine particles, aggregates or liquid crystals within the water phase, could be successfully incorporated into the Chaussee compositions. Indeed, there is no teaching or suggestion in Chaussee of separate oil and water phases.

In response to Appellants' argument regarding expectation of success, the Examiner simply states that "the test is what the combined teachings of the references would have suggested to those of ordinary skill in the art." Again, the Examiner provides no teachings in either of Chaussee or Wivell that would provide one of ordinary skill in the art with the expectation that the dispersed, insoluble, oil phase which exists as a separate and distinct phase of fine particles, aggregates or liquid crystals within the water phase, could be successfully incorporated into the Chaussee compositions.

Finally, even if the Wivell compositions were modified as suggested by the Examiner, all of the claimed limitations are not taught or suggested. Neither Wivell nor Chaussee, taken alone or in combination, teach or suggest a self foaming composition comprising a surfactant portion and a self foaming agent in the form of a liquid crystalline structure.

The Examiner argues that Wivell "clearly indicates that the composition can be in the form of liquid crystal in col. 4, lines 40-44." As discussed above, Wivell clearly limits the discussion of liquid crystals to the oil phase, which is a "separate and distinct phase" within the water phase. Further, neither Wivell nor Chaussee teach or suggest a self foaming composition comprising a surfactant mixture and a self foaming agent wherein the surfactant portion comprises a combination of (a) anionic; (b) amphoteric surfactant and (c) optionally nonionic surfactant and wherein the ratio of (a) to (b) to (c) is selected such that when the surfactant mixture is mixed with the self foaming agent a gel consistency is obtained.

The Examiner argues that "While Applicants assert that the liquid crystal phase in Wivell is limited to the oil phase, it is well known in the art that oil alone does not form liquid crystal

structure and that the formation of liquid crystal requires surfactants. That the liquid crystal phase in Wivell invention also requires surfactants mixture is inferred or obvious to one of ordinary skill in the art." Appellants strongly disagree. Wivell specifically states that the oil phase is a separate and distinct phase. See col. 4, lines 40-43. There is clearly no teaching or suggestion in Wivell of a composition comprising a surfactant mixture and at least one self foaming agent, wherein the composition is in the form of a liquid crystalline structure.

For all these reasons, Appellants respectfully submit that the rejection under 35 U.S.C. §103 with respect to Chaussee in view of Wivell is clearly erroneous and respectfully request reversal of the rejection.

B. Claims 15, 16, and 30 are not unpatentable under 35 U.S.C. §103 by Chaussee and Wivell further in view of U.S. Patent No. 6,666,362 ("Lorant").

Claims 15, 16, and 30 stand rejected under 35 U.S.C. 103(a) as being unpatentable over Chaussee and Wivell further in view of U.S. Patent No. 6,666,362 ("Lorant"). Appellants respectfully traverse this rejection.

Lorant fails to remedy the deficiencies of Chaussee and Wivell. Specifically, Lorant fails to teach or suggest a self foaming composition in the form of a liquid crystal. Accordingly, Appellants respectfully request that the rejection be reversed.

C. Claims 19 and 20 are not unpatentable under 35 U.S.C. §103 by Chaussee, Wivell and Lorant in view of U.S. Patent No. 5,858,343 ("Szymczak").

Claims 19 and 20 stand rejected under 35 U.S.C. 103(a) as being unpatentable over Chaussee, Wivell, Lorant further in view of United States Patent No. 5,858,343 ("Szymczak"). Appellants respectfully traverse this rejection. Like, Lorant, Szymczak fails to remedy the deficiencies of Chaussee and Wivell. Indeed, none of the references, take alone or in any combination, teach or suggest a self foaming composition in the form of a liquid crystal. Accordingly, Appellants respectfully request that the rejection be reversed.

For the above reasons, Appellants respectfully request that the rejections of record be reversed and that all claims on appeal be allowed.

If there are any other fees due in connection with the filing of this response, please charge the fees to our Deposit Account No. 10-0750/JBP-555/EMH. If a fee is required for an Extension of time 37 C.F.R. § 1.136 not accounted for above, such an extension is requested and the fee should also be charged to our Deposit Account.

Respectfully submitted,



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## APPENDIX

### (9) **Claims on Appeal**

1. A self foaming composition comprising:
  - (I) a surfactant mixture comprising (a) at least one anionic surfactant; (b) at least one amphoteric surfactant; and (c) optionally at least one nonionic surfactant; and
  - (II) at least one self foaming agent;

wherein the composition is in the form of a liquid crystalline structure and wherein the ratio of (a) to (b) to (c) is selected such that when the surfactant mixture is mixed with the at least one self foaming agent a gel consistency is obtained.
2. A self foaming composition according to claim 1, wherein the viscosity of the surfactant mixture prior to addition of the self foaming agent is less than about 9,500 cps.
3. A self foaming composition according to claim 2, wherein the viscosity of the composition after addition of the self foaming agent is at least about 20,000 cps.
4. A self foaming composition according to claim 1, wherein the concentration of the surfactant composition is at least about 10 %, based on the total weight of the composition.

5. A self foaming composition according to claim 1, wherein the at least one anionic surfactant is present at from about 2% to about 30%, based on the total weight of the composition.

6. A self foaming composition according to claim 5, wherein the at least one anionic surfactant is present at from about 5% to about 20%, based on the total weight of the composition.

7. A self foaming composition according to claim 1, wherein the at least one anionic surfactant is selected from alkyl sulfates; alkyl ether sulfates; alkyl monoglyceryl ether sulfates; alkyl monoglyceride sulfates; alkyl monoglyceride sulfonates; alkyl sulfonates; alkylaryl sulfonates; alkyl sulfosuccinates; alkyl ether sulfosuccinates; alkyl sulfosuccinamates; alkyl amidosulfosuccinates; alkyl carboxylates; alkyl amidoethercarboxylates; alkyl succinates; fatty acyl sarcosinates; fatty acyl amino acids; fatty acyl taurates; fatty alkyl sulfoacetates; alkyl phosphates; alkyl ether phosphates; and mixtures thereof.

8. A self foaming composition according to claim 1, wherein the at least one anionic surfactant includes sodium laureth sulfate.

9. A self foaming composition according to claim 1, wherein the at least one amphoteric surfactant is present at from about 2% to about 20%, based on the total weight of the composition.

10. A self foaming composition according to claim 9, wherein the at least one amphoteric surfactant is present at from about 3% to about 15%, based on the total weight of the composition.

11. A self foaming composition according to claim 1, wherein the at least one amphoteric surfactant is selected from amphocarboxylates, alkyl betaines, amidoalkyl betaines, amidoalkyl sultaines, amphophosphates, phosphobetaines, pyrophosphobetaines, carboxyalkyl alkyl polyamines, alkyl amino monoacetates, alkyl amino diacetates, and mixtures thereof.
12. A self foaming composition according to claim 11, wherein the at least one amphoteric surfactant include cocamidopropyl betaine.
13. A self foaming composition according to claim 1, wherein the surfactant mixture includes from about 1% to about 15% of at least one nonionic surfactant, based upon the total weight of the composition.
14. A self foaming composition according to claim 13, wherein the at least one nonionic surfactant is selected from polyoxyethylene derivatives of polyol esters, ethylene oxide/propylene oxide copolymers, (poly)glycerol esters, (poly)glycerol fatty acids, fatty acid alkanolamides, alkoxylated monoalkanolamides, alkoxylated dialkanolamides, aminoxides, ethoxylated fatty alcohols, ethoxylated fatty esters, ethoxylated glucosides, fatty gluconamides, and mixtures thereof.
15. A self foaming composition according to claim 13, wherein the at least one nonionic surfactant is selected from long chain alkyl glucosides or polyglucosides, which are the condensation products of (a) a long chain alcohol containing from about 6 to about 22 with (b) glucose or a glucose-containing polymer.

16. A self foaming composition according to claim 15, wherein the alkyl glucoside is selected from octyl glucoside, decyl glucoside, lauryl glucoside and mixtures thereof.

17. A self foaming composition according to claim 1, wherein the composition is free from ethoxylated fatty alcohols and ethoxylated fatty esters.

18. A self foaming composition according to claim 1, wherein the at least one self foaming agent is selected from pentane, isopentane, butane, isobutane, and mixtures thereof.

19. A self foaming composition according to claim 18, wherein the at least one self foaming agent comprises, based upon the total weight of self foaming agents, about 70% to about 90% isopentane and from about 10% to about 30% isobutane.

20. A self foaming composition according to claim 19, wherein the at least one self foaming agent comprising about 75% isopentane and about 25% isobutane, based upon the total weight of the self foaming agents.

21. A self foaming composition according to claim 1, wherein the at least one self foaming agent is present in the composition in an amount, based upon the total weight of the composition, of from about 4% to about 15%.

22. A self foaming composition according to claim 21, wherein the at least one self foaming agent is present in the composition in an amount, based upon the total weight of the composition, of from about 6% to about 12%.

23. A self foaming composition according to claim 1, having a pH in the range of from about 3 to about 9.
24. A self foaming composition according to claim 23, having a pH in the range of from about 4 to about 7.5.
25. A self foaming composition according to claim 1, wherein said composition is free from thickening agents or viscosity modifiers.
26. A self foaming composition according to claim 1, further comprising at least one conditioner.
27. A self foaming composition according to claim 26, wherein the at least one conditioner is selected from a cationic cellulose derivative; a cationic guar derivative; and derivatives and copolymers of diallyldimethylammonium chloride.
28. A self foaming composition according to claim 1, further comprising at least one skin conditioning agent.
29. A self foaming composition according to claim 28, wherein the at least one skin conditioning agent is selected from caprylic capric triglycerides, C<sub>12</sub>-C<sub>15</sub> alcohol benzoates, isopropyl palmitate, and glycerine.
30. A self foaming composition according to claim 1 wherein the at least one anionic surfactant is sodium laureth sulfate, the at least one amphoteric surfactant is cocamidopropyl

betaine and the at least one nonionic surfactant is decyl glucoside.

31. A self foaming composition according to claim 1, packaged in a barrier system.
32. A self foaming composition according to claim 31, wherein the barrier system is selected from a bag inside of a can or a piston system.
33. A self foaming composition according to claim 32, wherein the bag contains an outer polyester layer, a middle foil layer, and an inner polyethylene or polypropylene layer.